IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34251

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 617**
	)	
Plaintiff-Respondent,	)	**Filed: August 26, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SITHANONXAY INSYXIENGMAY,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment of conviction and unified sentence of nine years, with a minimum period of confinement of three years, for trafficking in methamphetamine, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Sithanonxay Insyxiengmay appeals from his judgment of conviction for trafficking in methamphetamine. Specifically, Insyxiengmay challenges the district court's order denying his motion to suppress and asserts that his sentence is excessive. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Police responded to an apartment complex after reports of suspicious activity. Neighbors and the apartment manager identified one particular apartment that had a number of cars and people coming and going at all hours of the day and for short periods of time. Two officers knocked on the apartment door and were greeted by the tenant, who became visibly nervous at their presence. The tenant invited the officers to enter upon their request and indicated that a

visitor, Insyxiengmay, was in the bathroom. The tenant gave permission for one officer to proceed down the hallway to the bathroom. The officer knocked on the bathroom door and asked Insyxiengmay to come out and talk to him, which he did ten minutes later. While the first officer waited by the bathroom, the second officer remained with the tenant and asked him questions. In response to questions about the increased activity at the apartment, the tenant responded that he had lots of friends. He further indicated that he acted as a middleman between drug suppliers and purchasers, which served as a small source of monthly income for him. He stated that he and Insyxiengmay had been smoking methamphetamine immediately prior to the officers' arrival, which they had done together on several occasions. The tenant showed the second officer drugs and drug paraphernalia that were in other areas of the apartment.

When Insyxiengmay came out of the bathroom, he proceeded to the living room with the first officer. Insyxiengmay made no incriminating remarks, but stated that he did not live at the apartment and gave the first officer permission to retrieve his identification from his jacket pocket. While retrieving the identification, the officer found two bundles of cash in the pocket--one containing $1,020 and the other containing $200. Insyxiengmay stated that the money was to pay bills. In the living room, the officers also noticed a shoebox containing a blow torch and several test tubes--the type typically used to make methamphetamine pipes--individually wrapped in paper towels. Based on the totality of the circumstances, the officers arrested Insyxiengmay for frequenting a place where drugs are used or sold.[1] While conducting a search of Insyxiengmay incident to arrest, the officers found a pair of digital scales as well as marijuana and 110 grams of methamphetamine.

Insyxiengmay was charged with trafficking in methamphetamine, twenty-eight grams or more, I.C. § 37-2732B(a)(4), and possession of drug paraphernalia with intent to use, I.C. § 37-2734A. Insyxiengmay filed a motion to suppress the evidence obtained as a result of the search incident to his arrest. The district court denied his motion, reasoning that the surrounding facts and circumstances were sufficient to give the officers probable cause justifying Insyxiengmay's arrest for frequenting a place where drugs are used or sold. Therefore, it reasoned that the search

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[1] Idaho Code Section 37-2732(d) provides that "it shall be unlawful for any person to be present at or on premises of any place where he knows illegal controlled substances are being manufactured or cultivated, or are being held for distribution, transportation, delivery, administration, use, or to be given away."

conducted incident to that arrest was lawful. Subsequently, Insyxiengmay pled guilty to trafficking in methamphetamine, reserving his right to appeal the suppression motion, and the remaining charge was dismissed. Insyxiengmay was sentenced to a unified term of nine years, with a minimum period of confinement of three years. Insyxiengmay appeals.

II.
ANALYSIS

A. Motion to Suppress

Insyxiengmay alleges that the officers lacked probable cause to arrest him for frequenting a place where drugs are used or sold. He argues that he was arrested based on his mere presence at the apartment. Therefore, the evidence obtained incident to his arrest should have been suppressed. The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999). A search incident to a valid arrest is among those exceptions and, thus, does not violate the Fourth Amendment proscription against unreasonable searches. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *State v. Moore*, 129 Idaho 776, 781, 932 P.2d 899, 904 (Ct. App. 1996). Pursuant to this exception, the police may search an arrestee incident to a lawful custodial arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Moore*, 129 Idaho at 781, 932 P.2d at 904. "The permissible scope and purposes of a search incident to an arrest is not limited to the removal of weapons but includes the discovery and seizures of evidence of crime and articles of value which, if left in the arrestee's possession, might be used to facilitate his escape." *Moore*, 129 Idaho at 781, 932 P.2d at 904.

A peace officer may make a warrantless arrest when a person has committed a public offense in the presence of the peace officer. I.C. § 19-603(1). Probable cause is "the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that such person is guilty." *State v. Julian*, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996). Probable cause is not measured by the same level of proof required for conviction. *Id*. Rather, this Court must determine whether the facts available to the officers at the moment of the seizure warranted a person of reasonable caution to believe that the action taken was appropriate. *Id.*; *State v. Hobson*, 95 Idaho 920, 925, 523 P.2d 523, 528 (1974). The application of probable cause to arrest must allow room for some mistakes by the arresting officer; however, the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability. *Klinger v. United States*, 409 F.2d 299, 304 (8th Cir. 1969); *Julian*, 129 Idaho at 137, 922 P.2d at 1063. The facts making up a probable cause determination are viewed from an objective standpoint. *Julian*, 129 Idaho at 136-37, 922 P.2d at 1062-63. That is, would the facts available to the officer, at the moment of the seizure or search, warrant a reasonable person in holding the belief that the action taken was appropriate. *Id.* In passing on the question of probable cause, the expertise and the experience of the officer must be taken into account. *State v. Ramirez*, 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct. App. 1991).

At the hearing on the motion to suppress, the officers testified concerning the tenant's admissions regarding the nature of the activities occurring at the apartment, his role as a middleman, and Insyxiengmay's frequent visits to use drugs with the tenant. The officers further testified regarding the discovery of materials used in the production and usage of methamphetamine. This testimony, as well as the discovered drugs and paraphernalia, led the district court to find that the officers had probable cause to believe that Insyxiengmay was knowingly frequenting a place where drugs were used or sold. The district court's findings of fact are supported by substantial evidence.

Insyxiengmay's argument rests upon his interpretation of our decision in *State v. Crabb*, 107 Idaho 298, 688 P.2d 1203 (Ct. App. 1984). In that case, officers executed a search warrant on a home and immediately after Crabb answered the door, he was arrested for knowingly frequenting a place where drugs are used or sold. We discussed the probable cause necessary to effectuate an arrest for frequenting:

> The officers in the present case arrested Crabb the moment he appeared at the door of the mobile home. They did not then have reason to suspect that Crabb *knew* that illegal controlled substances were being held at that place. Thus, Crabb was arrested for his mere presence at a place suspected of containing controlled substances. While the officers may have had the right to detain Crabb for investigation during the ensuing search of the premises pursuant to a valid search warrant, they had no right to arrest him or search his person *at that time*. Therefore, the search of Crabb's person cannot be upheld as a search incident to the first arrest.

Crabb, 107 Idaho at 303, 688 P.2d at 1208. There is no evidence that the officers arrested Insyxiengmay upon his appearance from the bathroom based on his mere presence alone. Rather, the district court correctly found that the officers conducted a reasonable investigation and then arrested Insyxiengmay for frequenting based on all the facts and circumstances available to them. *Crabb* is clearly distinguishable. Therefore, the district court's order denying Insyxiengmay's motion to suppress was not in error.

B. Sentence Review

Insyxiengmay next alleges that the district court abused its discretion in imposing an excessive sentence. He asserts that the district court failed to consider mitigating factors, including his admitted substance abuse problem and desire for treatment, the absence of prior felonies on his record, letters of support from family and friends, and his expression of remorse for the crime committed. The state argues that Insyxiengmay has failed to meet his burden of showing that his sentence was not necessary to achieve the objective of protecting society or of deterrence, rehabilitation, or retribution. It asserts that the district court did consider the mitigating factors, but decided on the sentence it imposed due to the greater weight it gave to considerations of protecting society from methamphetamine dealers and deterring trafficking in methamphetamine.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary

objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). A sentence need not serve all the sentencing goals or weigh each one equally. *State v. Dushkin*, 124 Idaho 185, 186, 857 P.2d 663, 665 (Ct. App. 1993). The primary consideration is, and presumptively always will be, the good order and protection of society. All other factors are, and must be, subservient to that end. *State v. Hunnel*, 125 Idaho 623, 873 P.2d 877 (1994); *State v. Pederson*, 124 Idaho 179, 857 P.2d 658 (Ct. App. 1993). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The maximum sentence authorized by statute for trafficking in methamphetamine is life imprisonment. The determinate sentence of three years imposed by the district court is the mandatory minimum required by statute. Insyxiengmay must show that the district court clearly abused its discretion in imposing an unreasonable indeterminate sentence under the facts of this case. Before imposing sentence, the district court noted that Insyxiengmay "doesn't have a prior criminal record" and considered that a substantial factor in imposing only the mandatory minimum period of confinement. The district court also acknowledged that "many people say nice things about [Insyxiengmay] as a person" and recognized his desire to overcome his drug addiction by imposing a six-year indeterminate period to ensure that he "does not continue to be involved in drugs in any fashion whatsoever." Therefore, the district court adequately addressed the mitigating factors in this case, and did not abuse its discretion in sentencing Insyxiengmay.

III.

CONCLUSION

Probable cause existed to arrest Insyxiengmay. Therefore, the district court did not err in denying Insyxiengmay's motion to suppress. Furthermore, Insyxiengmay's sentence is reasonable under the facts of this case. Accordingly, Insyxiengmay's judgment of conviction and sentence are affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**